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before the Subcommittee on the Constitution,
U.S. House of Representatives, Committee on the Judiciary,
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(Public Expression of Religion Act of 2005).

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INTRODUCTION

The Public Expression of Religion Act of 2005, introduced into the U.S. House of Representatives as H.R. 2679, addresses the damages available in lawsuits brought under 42 U.S.C. §§1983 and 1988 claiming a violation of the First Amendment Establishment Clause.[1] Only for such actions does H.R. 2679 seek to limit the remedies available to litigants to injunctive relief, as well as to prohibit any award of attorney's fees. This limitation and prohibition is logical since Section 1983 claims generally relate to violations of individual rights, whereas the Establishment Clause is more of a structural provision of the Constitution than a substantive individual rights provision. More importantly, the Public Expression of Religion Act is necessary to prevent a governmental chilling of free speech and free exercise rights under the First Amendment. As has been revealed through numerous Supreme Court decisions, a governmental fear of incurring Establishment Clause litigation can often cause that government to enact policies that discriminate against religious speech or practice. Certainly, the constant threat of attorney's fees under 42 U.S.C. 1988 is sufficient to incite that fear and subsequently bring about that discrimination.

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[1] The Public Expression of Religion Act of 2005 seeks to amend 42 U.S.C. 1983, which authorizes civil actions by individuals claiming to have been deprived of their civil rights by state or local officials, to provide that "the remedies with respect to a claim under this section where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion shall be limited to injunctive relief." H.R. 2679. The Act also seeks to amend 42 U.S.C. 1988(b) to state that "no fees shall be awarded under this subsection with respect to a claim" described above.

The threat of an attorney's fee award is particularly chilling because of the highly uncertain and inconsistent status of current constitutional doctrines governing the Establishment Clause. Over the past several decades, the courts have not only used an array of different constitutional tests for determining Establishment Clause violations, but have applied those tests in confusing and inconsistent ways. In 2005, for instance, the Supreme Court issued rulings on the same day in two cases involving the public display of the Ten Commandments. Those rulings, however, contained opposite holdings. In *McCreary County v. ACLU*,[2] the Court found a framed copy of the Ten Commandments in a courthouse hallway to be an unconstitutional establishment of religion. But in *Van Orden v. Perry*, the Court upheld a Ten Commandments monument on the grounds of the Texas state capitol.[3]

Not only were the rulings different in the two cases, but different constitutional tests were used in each case. In *Van Orden*, the plurality opinion did not even mention what had, up to that time, become the most prominent test for judging public displays or expressions of religion – the endorsement test -- nor did *Van Orden* employ the infamous *Lemon* test.[4] Instead, the Court resorted to a somewhat infrequently used test articulated in *Marsh v. Chambers:*[5] a test looking at whether there has been an unbroken tradition of certain religious acknowledgments, such as with the public display of the

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[2] 125 S. Ct. 2722 (2005).

[3] 125 S. Ct. 2854 (2005).

[4] 125 S. Ct. at 2861 (calling the *Lemon* test inappropriate for "passive" religious expressions).

[5] 463 U.S. 783, 792 (1983)(upholding the Nebraska legislature's practice of opening sessions with a prayer by a state-employed clergy).

Ten Commandments.[6] Furthermore, the crucial fifth vote supplied by Justice Breyer in *Van Orden* appeared to rely on yet a brand new test – a "legal judgment" test that seems to call on justices to exercise their common sense in cases such as these.[7]

In *McCreary*, on the other hand, the Court used a variation of the *Lemon* test – a variation that focused on whether a predominantly secular purpose had been behind the Ten Commandments display.[8] However, this 'purpose' test seems to contradict the direction the Court has been moving in its development of the neutrality approach, employed in the Cleveland school voucher case and which downplays 'purpose' of governmental action in favor of 'effect' of governmental action. Further complicating any doctrinal comparison of *McCreary* with *Van Orden* is the fact that the monument upheld in the latter case, on which were inscribed the words "I am the Lord thy God," was of a more overtly religious nature than was the framed document struck down in *McCreary*.[9]

As some commentators have noted, the *Van Orden* and *McCreary* decisions "utterly failed to resolve an issue that had been boiling over in the lower courts for the past decade."[10] According to Professor Laycock, the split decisions "mean that we will be litigating these cases one at a time for a

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[6] *Van Orden*, 125 S. Ct. at 2861-63.

[7] 125 S. Ct. at 2869 (Breyer, J., concurring).

[8] *McCreary*, 125 S. Ct. at 2736.

[9] *Van Orden*, 125 S. Ct. at 2893.

[10] Jay Sekulow & Francis Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 Wm. & Mary Bill Rts. J. 33, 34 (2005).

very long time."[11] This uncertainty, however, will inevitably lead governmental units to discourage or even prohibit public expressions of religion, even if those expressions do not violate the Establishment Clause, simply out of fear of incurring a large attorney's fee award in a Section 1983 action.

Because the Public Expression of Religion Act of 2005 is necessary to prevent a chilling of free speech and free exercise rights, it should not be seen as some special privilege or accommodation to religion. However, even if it is an accommodation, it is a permissible accommodation. Indeed, the Court has long held that legislative bodies can confer accommodations that facilitate religious practice and belief, so long as those accommodations do not discriminate among different religious sects. An examination of the historical background of the First Amendment shows that governmental accommodation of religion, as long as it is nondiscriminatory, lies solidly within the framers' intent.

I. IT IS LOGICAL TO TREAT ESTABLISHMENT CLAUSE CASES DIFFERENTLY UNDER 42 U.S.C. §§ 1983 AND 1988

The Establishment Clause is not an Individual Rights Clause

Section 1983 claims, which allow for the awarding of attorney's fees in actions for the deprivation of civil rights by state or local governments, focus primarily on remedying individual rights violations. But the Establishment Clause does not represent or reflect individual rights. For this reason, the remedies awarded in most establishment cases are not money damages to individuals; instead, the remedies are most often an injunction against the offending governmental practice or an overturning of a particular law or ordinance.

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[11] Douglas Laycock, *How to be Religiously Neutral*, Legal Times, July 4, 2005, at 42.

Unlike the Free Exercise Clause of the First Amendment, which protects a substantive individual right, the Establishment Clause is a structural clause, governing the relationship between "church and state." Its primary aim, to the framers, was to prevent in the United States a nationally established church like that of the Church of England. Thus, whereas the Free Exercise Clause focuses on the individual, the Establishment Clause focuses on the structural autonomy of religious institutions from state control, as well as of governmental institutions from the dictates of a chosen religious sect. As Justice Kennedy stated in *Lee v. Weisman*, the "Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions."[12]

II. THE PUBLIC EXPRESSION OF RELIGION ACT IS NECESSARY TO AVOID A CHILLING OF FIRST AMENDMENT RIGHTS

Not only do Establishment Clause violations not fit within the Section 1983 emphasis on individual rights violation, but the threat of attorney's fees in cases alleging Establishment Clause violations poses a chilling effect on the First Amendment freedoms of free speech and free exercise of religion.

The Supreme Court has specifically overturned governmental attempts to avoid Establishment Clause litigation when those attempts result in the chilling or infringement of free speech or religious

[12] *Lee v. Weisman,* 505 U.S. 577, 591-2 (1992).

exercise freedoms. In *Good News Club v. Milford Central School*,[13] for instance, the Court overturned a school board policy excluding religious groups from after-hours use of school facilities.[14] Previously, in *Lamb's Chapel v. Center Moriches Union Free School District*,[15] the Court had overturned a school district policy that, because of a fear of incurring Establishment Clause litigation, permitted outside groups to use school facilities for everything but religious purposes. The Court ruled that the Establishment Clause could not be used to single out and exclude religious groups.[16] Likewise, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[17] the Court held that a public university's refusal to subsidize a religious periodical published by a recognized student organization constituted viewpoint discrimination, since the university provided subsidies to a wide variety of nonreligious student periodicals.

These opinions stand for the proposition that fears of incurring Establishment Clause lawsuits cannot justify viewpoint discrimination against religious speech or organizations. Yet the kind of infringement on First Amendment freedoms that occurred in *Lamb's Chapel*, *Good News*, and *Rosenberger*, all because of a fear of facing Establishment Clause lawsuits, is just the kind of infringement that can arise because of the chilling effect caused by a fear of being saddled with a

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[13] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

[14] For a discussion of this case, see Douglas Kmiec, "Good News for Religion," 21 *Cal. Law.* 25 (May, 2001).

[15] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

[16] Ibid., 394.

[17] *Rosenberger*, 515 U.S. 819 (1995).

Section 1988 award for attorney's fees

III. SECTIONS 1983 AND 1988, AS CURRENTLY STAND, CAUSE A CHILLING OF FIRST AMENDMENT RIGHTS BECAUSE OF THE CONFUSING AND UNCERTAIN ESTABLISHMENT CLAUSE JURISPRUDENCE

The Unpredictable and Inconsistent Establishment Clause Doctrines

The chilling effect of Section 1983 attorney's fees results from the extremely unpredictable status of the Court's Establishment Clause doctrines. Because of the many different tests the Court applies in its different Establishment Clause cases, and because of the various and somewhat subjective ways in which those tests have been applied, it is reasonable to conclude that governmental units, fearing an award of attorney's fees against them, would simply play it safe and forbid any kind of religious expression that might somehow be subject to an Establishment Clause challenge.

This doctrinal inconsistency has led one court to describe Establishment Clause case law as suffering "from a sort of jurisprudential schizophrenia."[18] The various establishment tests that the Court has articulated have not only failed to provide a consistent guide to the relationships between government, public employees and the religious practices of society, but the tests have almost completely failed to bring about any kind of social harmony or agreement on the issue of religion in the public arena. As one legal scholar has observed, "we are moving less toward any type of consensus on this matter than toward a state of increased polarization and divisiveness."[19]

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[18] *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 717 (9th Cir. 1999).

[19] Daniel Conkle, "Toward a General Theory of the Establishment Clause," 82 Nw. L. Rev. 1113, 1160 (1988). Another commentator stated that "as a result of the multitude of tests and opinions stemming from Supreme Court Establishment Clause cases, there have been numerous

Over the past several decades, the courts have applied an array of tests to determine whether some governmental action constitutes an establishment of religion, with the first and most prominent being the one outlined in *Lemon v. Kurtzman*.[20] However, the *Lemon* test and its progeny have failed to provide any consistent basis for evaluating Establishment Clause cases.[21] As one legal scholar puts it: "There is no underlying theory of religious freedom that has captured a majority of the Court," and every new case "presents the very real possibility that the Court might totally abandon its previous efforts and start over."[22] Another scholar notes that the establishment doctrines being applied by the courts are "in nearly total disarray."[23]

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inconsistencies among the lower courts, as well as a general sense of confusion within society." Roxanne Houtman, "ACLU v. McCreary County: Rebuilding the Wall Between Church and State," *Syracuse Law Review*, Vol. 55, at 395, pp. 403-04 (2005). Over the past thirty years, "the Supreme Court's Establishment Clause jurisprudence has become increasingly ambiguous." Ibid.

[20] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[21] Russell L. Weaver, "Like a Ghoul in a Late Night Horror Movie," 41 *Brandeis Law Journal* 587, 590 (2003). As Justice William Rehnquist explained in a dissenting opinion in *Wallace v. Jaffree*, the *Lemon* test "has simply not provided adequate standards for deciding Establishment Clause cases." *Wallace v. Jaffree*, 472 U.S. 38, 111 (1985) (Rehnquist, J., dissenting).

[22] William P. Marshall, "What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence," 75 *Indiana Law Journal* 193 (2000).

[23] Kent Greenawalt, "Quo Vadis: The Status and Prospects of 'Tests' Under the Religion Clauses," 1995 *Supreme Court Review* 323, 323 (1995). "The failure to adopt a single Establishment Clause test has resulted in the use of a multitude of tests by lower courts, which is causing a growing number of disputes among the circuits." Roxanne Houtman, "ACLU v. McCreary County: Rebuilding the Wall Between Church and State," 55 *Syracuse Law Review* 395, 419 (2005).

The inconsistent legacy of *Lemon* is apparent in many ways.[24] For instance, although the Court had previously held that states could lend textbooks to religious schools,[25] in *Lemon* the Court ruled that states could not supplement the salaries of religious school teachers who taught the same subjects offered in public schools.[26] Though it later allowed book loans from public to parochial schools, the Court prohibited states from providing to religious schools various instructional materials, such as maps and lab equipment.[27] In one case, the Court struck down a state's provision of remedial instruction and guidance counseling to parochial school students,[28] only to later uphold another state's provision of speech and hearing services to such students.[29] Whereas some cases have permitted states to furnish religious schools with standardized tests[30] and pay the costs incurred by religious schools to administer such exams, others have prohibited states from helping finance the administration of state-required exams that were prepared by religious school teachers.[31]

Establishment Clause doctrines became so unpredictable that the Court took the unprecedented

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[24] Keith Werhan, "Navigating the New Neutrality: School Vouchers, The Pledge, and the Limits of a Purposive Establishment Clause," 41 *Brandeis Law Journal* 603, 610 (2003).

[25] *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968).

[26] *Lemon*, 403 U.S. 602, 617-21 (1971).

[27] *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975).

[28] *Meek*, 421 U.S. 349, 367-72 (1975).

[29] *Wolman*, 433 U.S. 229, 241-48 (1977).

[30] Ibid., 239-41.

[31] *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980).

step of overruling a decision it had reached under *Lemon*,[32] even though the Court still adhered to *Lemon* as providing the applicable law. This unpredictability stems from the fact that the second and third prongs of the *Lemon* test often call for distinctions that are too ambiguous to support a consistent constitutional jurisprudence.[33] The Court has even recognized that the inconsistencies of *Lemon* would continue until it could find a different, less fact-sensitive test.[34] In fact, some members of the Court have issued sharp criticisms of *Lemon*.[35] Their criticisms revolve around the fact that the secular purpose prong of the *Lemon* test often created the assumption that any law motivated by a desire to promote religious freedom or to accommodate religious practice automatically constituted an establishment.[36]

As *Lemon* began falling into disrepute, the Court experimented with other Establishment Clause tests. In *County of Allegheny v. American Civil Liberties Union*, involving the constitutionality of

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[32] *Aguilar v. Felton*, 473 U.S. 402, 410-14 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

[33] Werhan, "Negotiating the New Neutrality: School Vouchers, The Pledge, and the Limits of a Purposive Establishment Clause," 41 *Brandeis Law Journal* 603, 610 (2003).

[34] *Regan*, 444 U.S. 646, 662 (1980).

[35] *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655-6 (1989)(Kennedy, J., concurring in part and dissenting in part); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987)(Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985)(O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-12 (1985)(Rehnquist, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768-69 (1976)(White, J., concurring in the judgment).

[36] Michael Paulsen, "Lemon is Dead," 43 *Case Western Reserve Law Review*, 795, 801. The result was frequently a reading of the Establishment Clause that required functional hostility to religion "by treating the promotion of religious freedom – as distinguished from the promotion of religion – as an improper government motivation" (ibid.).

holiday displays on public property, the Court employed the endorsement test.[37] Then in 1992, in a case involving a rabbi-led prayer at a public high school graduation ceremony, the Court tried out the coercion test.[38] Finally, in *Zelman v. Simmons-Harris*,[39] where the constitutionality of Cleveland's school voucher program was upheld, the Court embraced the neutrality approach.[40] But the test most generally used to determine when the public expression of religion violates the Establishment Clause is the endorsement test – a test fraught with uncertainty.

The Ambiguities of the Endorsement Test

In *Lynch v. Donnelly*,[41] the Court began using the endorsement test to decide Establishment Clause issues. Subsequently, this test has become the Supreme Court's preeminent means for analyzing the constitutionality of religious symbols and expression on public property.[42] The coercion

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[37] *County of Alleghany*, 492 U.S. 573 (1989).

[38] *Lee v. Weismann*, 505 U.S. 577 (1992).

[39] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[40] However, according to one legal scholar, none of these doctrinal approaches "appears up to the task of providing a satisfying analytical framework for addressing problems that arise under either the Establishment Clause or the Free Exercise Clause." Brett G. Scharffs, "The Autonomy of Church and State," 2004 *Brigham Young University Law Review* 1217, 1236-37 (2004).

[41] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[42] Alberto B. Lopez, "Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment," 55 *Baylor Law Review* 167, 195 (2003). Since *County of Allegheny*, which confirmed the endorsement test as the Court's preferred method of analysis, the Court has continued its reliance on the endorsement test for Establishment Clause cases. The Court recently applied the test in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 316 (2000).

test, used in *Lee v. Weisman*,[43] had a relatively short existence. Under that test, a religious activity is unconstitutionally coercive if the government directs it in such a way as to force objectors to participate. At issue in *Lee* was a prayer offered by a school-invited rabbi at a graduation ceremony. The Court held that because graduation exercises are virtually obligatory, objectors to the prayer were unconstitutionally coerced into participating.[44] A problem with this approach, however, involves the Court's definition of participation. The Court said that "non-governmental social pressure occurring in a government-provided forum could constitute coercion forbidden by the establishment clause."[45] But this finding equates private social pressure occurring in a state-created forum with actual government compulsion.[46]

Since the unconstitutional coercion occurring in *Lee* was a result of peer pressure, the question arises as to whether a private prayer included in a state-sponsored activity taking place at an institution of higher education, where the participants would be older and hence less susceptible to peer pressure, would similarly violate the Establishment Clause. In *Tanford v. Brand*, however, the court ruled that a religious invocation as part of a graduation ceremony at a state university was not coercive.[47] Finding that students did not feel compelled to participate in the invocation, the court characterized it as "simply

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[43] *Lee*, 505 U.S. 577, 586 (1992).

[44] Ibid., 586.

[45] Paulsen, "*Lemon is Dead*," 832.

[46] Moreover, the Court's ruling actually undermines First Amendment values, since social pressure usually occurs in the form of speech. Ibid., 834.

[47] *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997).

a tolerable acknowledgment of beliefs widely held among the people of this country."[48]

The coercion test has lived a relatively brief life in Establishment Clause jurisprudence, having given way to the endorsement test as defined by Justice O'Connor.[49] Under this test, the government unconstitutionally endorses religion whenever it conveys the message that a religion or particular religious belief is favored by the state.[50] In *County of Allegheny v. ACLU*,[51] the Court struck down a city's practice of allowing a private religious group to place a creche on public property during the Christmas season.[52] In the very same case, however, the Court upheld another holiday display also located on public property – a display that combined a forty-five-foot Christmas tree and an eighteen-foot menorah.[53] Distinguishing the unacceptable creche in *Allegheny* from the permissible one in *Lynch*, the Court examined the setting and found that, unlike the elephants, clowns and reindeer that surrounded the creche in *Lynch*, nothing in the *Allegheny* display muted its religious message. The menorah, on the other hand, represented a holiday with both sectarian and secular aspects. Moreover, the placement of the menorah next to the Christmas tree (unlike the display with just the creche)

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[48] Ibid., 986.

[49] *Lynch*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring); *Estate of Thornton*, 472 U.S. 703, 711 (1985)(O'Connor, J., concurring in the judgment); *Wallace*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring in part and concurring in the judgment).

[50] *County of Allegheny*, 492 U.S. 573, 593 (1989).

[51] *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

[52] Ibid., 579-81 (although the creche was owned by a Roman Catholic group, the city of Pittsburgh stored, placed and removed it).

[53] Ibid., 581-7.

symbolized two faith traditions – one Jewish and one Christian – conveying the message that the city recognized more than one manner of celebrating the holiday.[54] Thus, while the creche was considered an endorsement of the Christian faith, the tree and menorah were acceptable, insofar as together they did not give the impression that the state was endorsing any one religion.[55]

A problem with the endorsement test is its subjectivity regarding a court's conclusions as to what impressions viewers might have of some religious display or speech. Because the test calls for judges to speculate about the impressions that unknown people may have received from various religious speech or symbols, it is incapable of achieving certainty. [56] One judge has written that the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary."[57]

Justice Kennedy, a critic of the endorsement test, declared it to be "flawed in its fundamentals and unworkable in practice."[58] According to Justice Kennedy, the endorsement test results in a

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[54] Ibid., 616-17 (noting that the Christmas tree was once a sectarian symbol but that it has lost its religious overtones).

[55] Ibid., 620-1. In *Allegheny*, the Court concluded that, as to the creche, "no viewer could reasonably think that it occupied this location without the support and approval of the government." *County of Allegheny*, 492 U.S. 513, 599-600 (1989). The tree and menorah, on the other hand, did not present a "sufficiently likely" probability that observers would see them as endorsing a particular religion. Ibid., 620.

[56] Steven D. Smith, "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test," 86 *Michigan Law Review* 266, 301 (1987).

[57] *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987)(Easterbrook, J., dissenting).

[58] *County of Allegheny*, 492 U.S. 573, 669 (1989).

"jurisprudence of minutia" that requires courts to consider every little detail surrounding the religious speech, so as to determine whether an observer might read into the speech an endorsement by the government. In *Allegheny*, this meant that the Court had to examine "whether the city has included Santas, talking wishing wells, reindeer, or other symbols" to draw attention away from the religious symbol in the display.[59]

Under the endorsement test, courts have tended to view any religious expression by public officials as an automatic equivalent of establishment, no matter how much that single religious expression may be surrounded by secular messages, and no matter the age or maturity of the audience. In one case, even though the students were adults and not children, endorsement occurred when a professor at a public university organized an after-class meeting on religious topics, which was attended by several of his students.[60] And when a high school biology teacher denied the theory of evolution and discussed his religious views with students during the school day, the court held that the government had improperly endorsed a religion.[61]

The 'context' of a religious message can also produce subjectivity in the endorsement test. The courts have given mixed signals regarding 'context:' namely, the issue of when a religious text or symbol has become sufficiently 'diluted' by surrounding secular texts and symbols so as to prevent it from

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[59] Ibid., 674. The banning of the creche, in Kennedy's opinion, reflected "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require." Ibid., 655, 664.

[60] *Bishop v. Aronov,* 926 F.2d 1066, 1068-9 (11th Cir. 1991). In *Bishop*, the professor prefaced his remarks by labeling them his "personal bias," thus denying any implication of institutional endorsement (ibid., 1066,1068).

[61] *Peloza v. Capistrano Unified School District*, 37 F.3d 517, 519-20 (9th Cir. 1994).

becoming an endorsement of religion. In *Allegheny*, the Court held that a creche located on the steps of a county courthouse was prominent enough to constitute an endorsement.[62] On the other hand, the religious message conveyed by a publicly displayed menorah was sufficiently diluted by the presence of a Christmas tree to keep it from becoming a state endorsement.[63]

One year after *Allegheny* was decided, the Sixth Circuit in *Doe v. City of Clawson*[64] found no Establishment Clause violation by the display of a creche in front of city hall. According to the court, the presence of other "holiday artifacts" and secular symbols had "diluted" the religious message of the creche.[65] A similar result occurred in *Jocham v. Tuscola County*,[66] where the court held that a creche located on a courthouse lawn was sufficiently diluted by secular objects like toy soldiers and decorative wreaths, as well as by a sign indicating that the display was privately-funded.[67] The presence of such a disclaimer proved to be controlling in *Americans United for Separation of Church and State v. City of Grand Rapids*,[68] in which the court upheld a private group's display of a 20-foot high steel menorah

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[62] 492 U.S. at 598-602.

[63] Ibid. 617, 635.

[64] 915 F.2d 244 (6th Cir. 1990).

[65] Ibid., 247.

[66] 239 F.Supp.2d 714 (E.D. Mich. 2003).

[67] Ibid., 719, 743. But the issue of context and whether any religious message is sufficiently diluted is an almost unanswerable question. For example, what if the Ten Commandments were displayed along with three dozen other documents underlying the nation's history? Would the other documents sufficiently mute any religious message of the Ten Commandments? Or what if the Ten Commandments was the only non-United States document in the display, what message would that send?

[68] 980 F.2d 1538 (6th Cir. 1992).

in a downtown public park. Although recognizing that the display sent a religious message and did not include secular symbols, the court gave great weight to the presence of two disclaimers indicating that the display was privately-sponsored and did not constitute an endorsement of religion.[69] The court found that these disclaimers allowed a reasonable observer to distinguish "between speech the government supports and speech that it allows."[70]

Under the endorsement test, no concrete boundary exists as to where establishment begins or ends. There is nothing so minute that it cannot rise to the level of an official government endorsement of religion. Leaflets dropped in student mailboxes, announcing church social activities, have been ruled an unconstitutional establishment. This occurred in an Ohio school district, whose policy permitted non-profit community groups such as Little League, the Red Cross and the YMCA to distribute leaflets advertising their activities. Religious groups could also distribute their materials, but only after the principal scrutinized those leaflets, ensuring that they only advertised specific activities and did not engage in any proselytizing. Moreover, the leaflets were not even handed out personally to the children; they were placed in mailboxes from which students could retrieve them at the end of the school day. Yet despite all these precautions, the court held that "the practice of distributing religious material to students could be construed as an endorsement of religion by the school."[71]

In another case, the singing of "The Lord's Prayer" by a high school choir was found to violate

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[69] Ibid., 1544-46.

[70] Ibid., 1545.

[71] *Rusk v. Crestview Local Schools*, 220 F.Supp.2d. 854, 858 (N.D. Ohio 2002).

the Establishment Clause.[72] According to the court, just the rehearsal of that song during choir practice was enough to constitute a violation. In a prime example of the jurisprudence of minutia, the court held that for a public school choir to sing just one religious-oriented song is to "advance the Christian religion."[73]

Although the endorsement test requires a constant judicial oversight of religious speech, it does not seem to allow for any remedial action. For instance, a city that erected a creche on the lawn of its civic center was not allowed to modify that display so as to comply with endorsement test mandates. After receiving complaints from the ACLU, the city added the following decorations to the creche scene displayed outside the civic center: several reindeer, a large Santa Claus with a sack of presents, three-foot-tall candy canes, a snowman flanked by gift boxes, and various animals including lambs and donkeys.[74] Despite these changes, however, the court concluded that they "did not rescue the display from impermissible endorsement."[75] According to the court, the "context" of the display included the time period during which the original creche stood -- hence, the secular figures later added did not negate the earlier message of endorsement. Consequently, the end result is: once an endorsement, always an endorsement. No matter what the city did, it could not remedy any constitutional defects.

As applied, the endorsement test renders nearly impossible any remedial efforts. No matter

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[72] *Skarin v. Woodbine Community School District*, 204 F.Supp.2d 1195 (S.D. Iowa 2002).

[73] Ibid., 1197.

[74] *American Civil Liberties Union v. City of Florissant*, 17 F.Supp.2d 1068, 1071 (E.D. Mo. 1998).

[75] Ibid., 1075.

what subsequent steps are taken to disassociate the governmental unit from the particular religious speech or symbol, the courts can always point to whatever endorsement may have occurred prior to that disassociation. In *Mercier v. City of La Crosse*,[76] plaintiffs sued to force the removal from a public park of a monument bearing the Ten Commandments. The monument had been placed in the park forty years earlier by the Fraternal Order of the Eagles. In an attempt to avoid the lawsuit, the city sold back to the Eagles the 20 foot by 20 foot plot of land on which the monument stood. Subsequently, the Eagles installed a four foot tall iron fence around the perimeter of the parcel, with signs at each corner of the fence stating that the monument was the private property of the La Crosse Eagles. Six months later, the city erected a second iron fence around the monument. This fence was gated, and hanging on it was a sign that read: "This property is not owned or maintained by the City of La Crosse, nor does the City endorse the religious expressions theron." Yet despite all these actions, the court held that the city had failed to cure the Establishment Clause violation and that a reasonable observer could still conclude that the city was sponsoring the monument.

The *Mercier* court acknowledged that the disclaimer sign might prevent a newcomer to La Crosse from perceiving any city endorsement of the religious message. The problem, however, lay with the long-time residents of the city. According to the court, those residents would know about the city's relationship with the monument, its desire to keep the monument on city property, and its efforts to resist removal of the monument. And yet, what the court did not recognize was that these same residents would know that a federal judge had ruled the original monument to be a violation of the

[76] *Mercier v. City of La Crosse*, 276 F.Supp.2d 961 (W.D. Wis., 2003).

Establishment Clause and that the city was prohibited from endorsing the monument's religious message. Presumably, this knowledge would significantly reduce the feelings of alienation suffered by the plaintiffs who did not believe in or agree with the religious ideas conveyed by the Ten Commandments.

The endorsement test has thrown First Amendment jurisprudence into a pit of ambiguity.[77] It tends to elevate human emotions to the level of constitutional trump cards. In *Mercier*, for example, a privately financed Ten Commandments monument was successfully challenged on the grounds that it "emotionally disturbed" a plaintiff who viewed it, that it caused another plaintiff to feel "marginalized," that it distracted a third plaintiff and caused her emotional distress, that it "so upset" still another plaintiff that she became "sick to her stomach," and that it caused another so much "stress and disturbance" that she lost sleep.[78]

The Causes of the Current Establishment Clause Confusion

The contorted, confusing, historically-contradictory course of modern establishment doctrine

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[77] Even though a number of Justices "find irresistible the proposition that government should not make anyone feel like an outsider by endorsing religion," these same Justices seem uninclined to overturn free exercise exemptions for religious objectors, or the use of the national motto 'In God We Trust,' or even the opening of Supreme Court sessions with the plea "God save the United States of America and this Honorable Court." Steven Smith, "Nonestablishment Under God," 50 *Villanova Law Review* 1, 13-14 (2005). There is also the example posed by Justice Stevens: what about the observer who thinks the exhibition of an "exotic cow" in the national zoo conveys the government's endorsement of the Hindu religion? Ibid., 15-16.

[78] 276 F.Supp.2d at 966-67.

began with *Everson v. Board of Education,*[79] which marked the Court's entry into what would become a convoluted maze of Establishment Clause jurisprudence. In ruling on the constitutionality of a program allowing parents to be reimbursed for the costs of transporting their children to and from parochial schools, the *Everson* Court gave its view of the Establishment Clause:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'"[80]

The specific examples listed above by the Court – establishing an official church, aiding or giving preference to any one religion, forcing a person to profess a belief in any religion – seem straightforward enough and consistent with history. But it was the last sentence of this long quote that has proved to be the curse of Establishment Clause jurisprudence over the past half-century, for it is anything but indicative of the framers' intentions regarding the constitutional treatment of religion. As later discussed, not only did the framers not believe in a wall of separation between church and state, but they never even once used such a phrase during the debates on the First Amendment.

The "wall of separation" metaphor articulated in *Everson* continued to influence the course of

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[79] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[80] Ibid., 15-16.

constitutional law throughout the 1960s, as the number of Establishment Clause cases reaching the courts steadily increased.[81] Then, with the 1971 decision in *Lemon v. Kurtzman,*[82] the 'wall of separation' metaphor launched a new phase in Establishment Clause jurisprudence. In *Lemon*, the Court examined the constitutionality of two state statutes that provided public money to parochial schools.[83] In striking down the statutes, the Court articulated what would be known as the three-part *Lemon* test: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[84]

Throughout the next decade and a half, the *Lemon* test prevailed as the standard by which courts adjudged Establishment Clause issues. But the "net effect" of the decisions coming down from the Burger Court during the 1970s was to "raise the wall of separation to a height never before reached."[85] In *Lynch v. Donnelly,*[86] however, the Court began rethinking the separationist view that had been articulated in *Everson* and later incorporated into *Lemon*. In upholding the constitutionality

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[81] Alberto B. Lopez, "Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment," 55 *Baylor Law Review* 167, 183 (2003).

[82] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[83] Ibid., 606. The Pennsylvania statute provided money to nonpublic schools by reimbursing the schools for expenses associated with teachers' salaries and teaching materials, including textbooks. Under the Rhode Island statute, the state made a supplemental payment of 15% of a teacher's salary directly to teachers in nonpublic schools (ibid., 606-7).

[84] Ibid., 613.

[85] Viteritti, *"Reading Zellman,"* 1116.

[86] *Lynch v. Donnelly,* 465 U.S. 668 (1984).

of a Christmas display that included a creche and that was owned and maintained by the city of Pawtucket, Rhode Island, the *Lynch* Court stated that the wall of separation "is a useful figure of speech" but "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[87]

The separationist approach contradicts the intentions of the First Amendment framers, who never intended the notion of separation to justify discrimination against religion's role in the public sphere.[88] As recognized by the Fifth Circuit Court of Appeals, the First Amendment "does not demand that the state be blind to the pervasive presence of strongly held views about religion," nor that religion and government "be ruthlessly separated."[89] Likewise, Justice Goldberg has observed that:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.[90]

Not only does the 'wall of separation' metaphor contradict the spirit of the First Amendment, but it provides a completely inappropriate constitutional doctrine. As Justice Reed pointed out, a rule of law should not be constructed from a figure of speech, lifted from a letter Thomas Jefferson wrote years after the First Amendment was ratified to the Danbury Baptists, who sought relief from

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[87] Ibid., 673.

[88] Michael Stokes Paulsen, "Lemon is Dead," 43 *Case Western Reserve Law Review* 795, 810 (1993).

[89] *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2003)

[90] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring).

discriminatory treatment by the Congregationalist establishment in Connecticut.[91] Furthermore, as historians have pointed out, the 'wall of separation' metaphor does not even reflect an accurate portrayal of Jefferson's beliefs.

Thomas Jefferson's influence in the area of law and religion has stemmed primarily from a single phrase (from among his more than sixty volumes of writings) recited by the Court in *Everson*: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[92] Subsequent to *Everson*, the Supreme Court has constructed three different establishment tests, all based on Jefferson's metaphor: the *Lemon* test; the Endorsement test,[93] and the Coercion test.[94] Indeed, the vast majority of Establishment Clause cases have either cited or relied upon Jefferson's 'wall of separation' metaphor. And yet, according to numerous historical studies, the Court's reliance on Jefferson and his 'wall of separation' metaphor has been misplaced.

Daniel Dreisbach's *Thomas Jefferson and the Wall of Separation between Church and State* addresses the historical origins of the view that the First Amendment was designed to create a

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[91] *McCollum* , 333 U.S. 203, 247 (1948)(Reed, J., dissenting).

[92] *Everson*, 330 U.S. 1, 16.

[93] *Lynch*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring). Justice O'Connor's concurring opinion in *Lynch* was adopted by a majority of the Court in *County of Allegheny,* 492 U.S. 573 (1989).

[94] *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

wall of separation between religion and government.[95] Dreisbach argues that Jefferson's wall of separation differs both in "function and location" from the "high and impregnable barrier erected in 1947" by Justice Hugo Black in *Everson v. Board of Education*.[96] As Dreisbach explains: "Whereas Jefferson's wall explicitly separated the institutions of church and state, Black's wall, more expansively, separates religion and all civil government."[97]

Casting doubt on Jefferson's own belief in a strict separation of state and religion, as interpreted by modern courts, are his actions as president. During Jefferson's presidency, for instance, Congress approved the use of the Capitol building as a church building for Christian worship services,[98] which Jefferson attended on Sundays.[99] Jefferson even approved of paid government musicians assisting the worship at those church services.[100] He also supported similar worship services in his own Executive

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[95] Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, (New York: New York University Press, 2002). For other works examining the historical origins of the wall of separation, Philip Hamburger, *Separation of Church and State*, (Cambridge, Mass: Harvard University Press, 2002); John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties*, (Boulder, Co.: Westview Press, 2000); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*, (New York: Oxford University Press, 1995); John C. Jeffries, Jr. & James E. Ryan, "A Political History of the Establishment Clause," 100 *Michigan Law Review* 279 (2001); J. Clifford Wallace, "The Framers' Establishment Clause: How High the Wall?," 2001 *Brigham Young University Law Review* 755 (2001).

[96] Ibid., 125.

[97] Ibid.

[98] 10 Annals of Cong. 797 (1800).

[99] James Hutson, *Religion and the Founding of the American Republic*, (Washington, D.C.: Library of Congress, 1998), 89.

[100] Ibid., 84.

Branch, both at the Treasury Building and at the War Office.[101] Later, when Jefferson founded the University of Virginia, he designated space in its Rotunda for chapel services and indicated that he expected students to attend religious services there.

Some scholars argue that, even if *Everson's* use of the 'wall of separation' metaphor does reflect Jefferson's views, those views did not at all represent those of the individuals actually responsible for drafting and ratifying the First Amendment.[102] (Not only did Thomas Jefferson not participate in the debates on the First Amendment, he was not even in the country at the time.) The essential themes that run through the pre-enactment debates of the Religion Clauses were limited to the preservation of individual liberty and the preservation of religious institutional autonomy.[103] The historical record demonstrates that, in the years leading up to adoption of the First Amendment, the colonies, states, and Continental Congress frequently enacted legislative accommodations to religions and religious practices. There is "no substantial evidence that anyone at the time of the Framing viewed such accommodations

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[101] Ibid., 89.

[102] Hamburger, *Separation*, 109, 162 (contending that at the time Jefferson expressed such views, they were not "widely published or even noticed"). Steven Smith argues that the Establishment Clause was designed to protect the established state religions from federal interference; and as such, "the religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom." Smith, *Foreordained*, 30. Paulsen, *"Religion, Equality, and the Constitution,"* 317 ("The original intention behind the establishment clause...seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion.").

[103] Chester J. Antieau et al., *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses,* (Milwaukee: Bruce Pub. Co., 1964), 42 (demonstrating that the Religion Clauses of the First Amendment were designed to prohibit the use of religion as an instrument of national policy by forbidding exclusive privileges to any one sect).

as illegitimate, in principle."[104] Furthermore, during the debates over the First Amendment, not one of the ninety framers ever mentioned the phrase "separation of Church and State."[105] Yet it seems logical that if this had been their objective, at least one would have mentioned the phrase that, through the *Everson* decision, would later come to shape the constitutional relationship between church and state.

Constitutional Confusion Intensifies the Threat and Costs of Litigation, Which in Turn Causes a Chilling of First Amendment Freedoms

Prior to the 1970s, there had existed a sweeping recognition by the courts of the religious presence in American public life. In 1931, the Supreme Court declared that Americans were a religious people,[106] and in 1963 the Court held that the First Amendment prohibited judicial "hostility" toward religion.[107] But with *Lemon v. Kurtzman*, the courts turned sharply separationist in their opinions regarding public accommodation of religion, and they have used the Establishment Clause to enforce "a strict separation of church and state at all levels of American government."[108] As Justice Arthur Goldberg once wrote, the strict separationist approach carries an attitude of "a brooding, and

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[104] Michael McConnell, "Accommodation of Religion: An Update and a Response to the Critics," 60 *George Washington Law Review* 685, 693 (1992).

[105] *The Congressional Records* from June 8 to September 24, 1789 chronicle the months of discussions and debates of the ninety Framers of the First Amendment. 1 Annals of Cong. 440-948 (1789).

[106] *United States v. MacIntosh*, 283 U.S. 605, 625 (1931). Harold Berman, "Religion and Law: The First Amendment in Historical Perspective," 35 *Emory Law Journal* 777, 779 (1986) (suggesting that prior to mid-twentieth century, the United States thought of itself as a Christian county).

[107] *School District v. Schempp*, 374 U.S. 203, 225 (1963).

[108] Conkle, "Toward a General Theory of the Establishment Clause," p. 1117.

pervasive devotion to the secular and a passive, or even active, hostility, to the religious."[109]

Throughout the post-*Lemon* era, conflicts over the public expression or presence of religion have become virtually institutionalized. In Dickson, Tennessee, public school officials refused to let a student submit a paper on the life of Jesus Christ for a ninth-grade English class.[110] Elsewhere, school officials removed a kindergartner's drawing of Jesus Christ from a display of student posters depicting things for which they were grateful.[111] A court ruled that coaches could not participate in their student-player prayers.[112] School authorities refused to allow the distribution of brochures advertising a summer Bible camp.[113] And in Florida, one county even banned Christmas trees from being displayed on public property, after its county attorney decided that they qualified as religious symbols.[114]

The courts' uncertain interpretation of 'establishment' has encouraged litigation over just about every occurrence of public-associated religious expression. Exemplifying this trend, a lawsuit was filed after a Chicago park district refused to allow a family to inscribe a religious message on a brick they had purchased as part of a fundraising effort for a new playground. The bricks, used for paving the center of the playground, could be inscribed with whatever message the purchaser wanted, as long as it

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[109] *School Dist. v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring).

[110] *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

[111] *C.H. v. Oliva*, 990 F. Supp. 341, 353-54 (D.N.J. 1997).

[112] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-7 (5th Cir. 1995).

[113] *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003).

[114] "County Bans Xmas Tress in Public Buildings," *FoxNews*, December 17, 2004, at www.foxnews.com/printer_friendly_story/0,3566,141805,00.html.

did not have any religious content.[115] In another brick-fundraiser case, a New York public school ended up removing from a front walkway all bricks containing religious messages.[116] Elsewhere, a brick inscribed with the message "For All the Unborn Children" was removed from a city park, as were bricks inscribed with a student's name and a cross from a flagpole plaza.[117] The basis of these removals was the fear that a few privately-composed religious messages, included among many more non-religious messages, were enough to connote an official government establishment of religion.

IV. *THE PUBLIC EXPRESSION OF RELIGION ACT* IS A PERMISSIBLE ACCOMMODATION OF RELIGION

The Establishment Clause has been interpreted to permit accommodations of religion, as long as those accommodations do not discriminate among different religious sects.[118] Accommodations do not amount to permanent alliances between government and selected religious

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[115] The Associated Press, "Couple Claims City Unfairly Barred Jesus Brick from Playground," The First Amendment Center Online, 24 July 2003, http://www.fac.org/news.aspx?id=11741.

[116] The Associated Press, "Ministers Sue N.Y. School District Over Religious Bricks," The First Amendment Center Online, 11 September 2000, http://www.fac.org/news.aspx?id=5788.

[117] The Associated Press, "School District Sued After Walkway Crosses Removed," The First Amendment Center Online, 28 March 2003, http://www.fac.org/news.aspx?id=6569.

[118] Rodney K. Smith, "Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?" 43 *Case Western Reserve Law Review* 917, 920 (1993). As one scholar has noted, it can "hardly be argued that the government establishes religion by the simple act of making public funding available on a formally neutral basis to all organizations, religious and non-religious, willing to provide an identifiably secular service." Paul E. Salamanca, "Quo Vadis: The Continuing Metamorphosis of the Establishment Clause Toward Realistic Substantive Neutrality," 41 *Brandeis Law Journal* 575, 579 (2003). If the case were otherwise, religious organizations would then become essentially second-class citizens regarding their right to participate in governmental programs.

denominations. With accommodation, the individual decides for herself how or what to practice, and then the government simply facilitates.[119] As Professor Conkle notes, "there is nothing approaching a consensus, historical or contemporary, for the proposition that government should be precluded from favoring religion generally, as against irreligion."[120] In fact, inherent in the very text of the First Amendment is a constitutional favoritism of religion.

The intent of the Establishment Clause was to free religious institutions from ecclesiastical coercion by the government, not to prevent the state from accommodating religion and taking advantage of the unique social contributions of religion.[121] To the framers, "government noninvolvement in the province of the church did not mean total government separation from general religious ideas and affirmations relevant to civic life."[122]

Short of the state's imposition of a national religion, the Establishment Clause should not

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[119] Such facilitation occurred in *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772 (1981), where the Court ruled that a religious school was exempt from paying the unemployment compensation tax required by federal law. But the Court has also allowed public funds to go to religious institutions to help them operate. In *Tilton v. Richardson,* 403 U.S. 672 (1971), the Court consented to federal construction funds flowing to church-affiliated colleges for buildings used for secular educational purposes. The Court also upheld in *Hunt v. McNair,* 413 U.S. 734 (1973), a state-funded bonding program that allowed religious colleges to obtain construction loans at low interest. In addition, the Court allowed a blind student to receive public vocational rehabilitation aid that paid the student's tuition at a religious college. *Witters v. Wa. Dept. of Servs.,* 474 U.S. 481 (1986).

[120] Conkle, "Toward a General Theory of the Establishment Clause," 1157.

[121] Esbeck, "Dissent and Disestablishment," 1396.

[122] Thomas Berg, "The Voluntary Principle and Church Autonomy, Then and Now," 2004 *Brigham Young University Law Review*, 1593, 1597 (2004). The eighteenth century notion of separation designed "primarily to protect the vitality and independence of religious groups" stood in "marked contrast to a separationism founded on a suspicion of religion." Ibid.

prevent a democratic government from being responsive to the beliefs and values of its citizens. And in a society in which over ninety percent of the citizens claim to be religious, to say that government should not be responsive to religion is to say that government should not be responsive to the opinion of the people.[123] Indeed, perhaps there is no clearer example of governmental accommodation of religion than in the special accommodations made by the military, which employs more than 1400 ministers of 86 different religious denominations and operates some 500 chapels.[124]

Constitutional accommodations have arisen in a number of circumstances. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,[125] religious organizations were given exemptions from the antidiscrimination requirements of Title VII, thereby allowing them to favor members of their own faith when hiring for ministerial positions. A similar need for accommodation was highlighted in a case holding that enforcement of laws requiring property owners to rent to unmarried couples violated the religious freedom of owners who were devout Christians.[126] In *Zobrest v. Catalina Foothills School District,*[127] the Court upheld the provision of a

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[123] Richard John Neuhaus, "A New Order of Religious Freedom," 60 *George Washington Law Review* 620, 629 (1992). As Professor Smith argues, "a principle that forbids governmental invocation of religion may have the effect of rendering us tongue-tied when it comes to explaining our most basic political commitments," and this muffling on "the most basic matters is not a promising foundation for enduring political community," Steven Smith, "Nonestablishment Under God?" 50 *Villanova Law Review* 1, 11 (2005).

[124] John T. Noonan, *The Lustre of Our Country: the American Experience of Religous Freedom*, (Berkeley: University of California Press, 1998), 220.

[125] *Amos*, 483 U.S. 327 (1987).

[126] *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 717 (9th Cir. 1999).

[127] *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

publicly funded sign-language interpreter for a deaf student at a religious school, noting that "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" do not violate the Establishment Clause.*[128]*

Municipalities frequently adopt ordinances that accommodate religious organizations.[129] In these ordinances, certain types of establishments, such as theaters, fire stations and bars are often excluded within a certain distance from religious houses of worship.[130] The presumption is that religious exercise is a valuable activity to protect, and minimizing the types of businesses that might be "demoralizing or annoying" to churchgoers is one way of doing so.[131] Furthermore, America's "unbroken" history of giving tax exemptions for religious property – a history reaching back to colonial times – reflects a longstanding tradition of government accommodation of religion.[132]

Accommodation tries to understand the special needs of religious exercise and support governmental efforts to facilitate that exercise. In *Zorach v. Clauson,* Justice Douglas articulated the constitutional basis for accommodating religion and the religious needs of citizens:

> We are a religious people whose institutions presuppose a Supreme Being. . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our

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[128] Ibid., 8.

[129] James E. Curry, *Public Regulation of the Religious Use of Land*, (Charlottesville Va.: Michie 1964), 3.

[130] Anson Phelps Stokes, *Church and State in the United States*, (New York: Harper, 1950), 369.

[131] Ibid., 419, 369.

[132] *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970).

> traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[133]

Courts have thus long accepted the notion of governmental accommodation of religion, and inherent within any accommodation is a preferential treatment given to religion. In *Arver v. United States*, the Court upheld certain religious exemptions contained in the Selective Service Act. This spirit of accommodation continued in *Zorach v. Clauson*, where the Court upheld a public school program allowing students release time to attend religious classes off the school's premises. In *Walz v. Tax Commission*, the Court sustained a state tax exemption of church property, ruling that it did not constitute an establishment of religion. *Transworld Airlines v. Hardison* upheld Title VII provisions that required employers to make reasonable accommodations to their employees' religious needs.

In *Stark v. Independent School District,* the court held that a school district's arrangement with a small religious group, whereby the religious parents were allowed to send their children to a public school containing one multi-age classroom that conformed to the group's religious tenets opposing the use of computers, did not amount to an unconstitutional establishment.[134] The religious group provided the building to be used as a public school, open to anyone who would want to attend, on the condition that the state provide the books and a teacher. The accommodation made by the state, and approved by the court, involved the state's agreement to operate the school in accordance with the group's religious objection to the use of technological devices such as computers and

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[133] *Zorach v. Clauson* , 343 U.S. 306, 313-14 (1952).

[134] *Stark v. Independent School District, No. 640,* 123 F.3d 1068 (8th Cir. 1997).

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There are two types of accommodation. The first type involves seemingly mandatory accommodations that are required by the Free Exercise Clause.[135] In this respect, any accommodation provided by the Public Expression of Religion Act could well amount to a mandatory accommodation, since it is necessary to avoid any chilling of First Amendment freedoms caused by the current remedy provisions of 42 U.S.C. Sections 1983 and 1988.

A second type of accommodation, however, involves the permissive kind -- ones that are not required by the Free Exercise Clause, but also not prohibited by the Establishment Clause. For example, regarding tax exemptions of religious property, the Court has generally concluded that while they are neither proscribed by the Establishment Clause nor prescribed by the Exercise Clause, they are nonetheless constitutionally permissible.[136]

Another way to look at this issue is to consider the costs of not accommodating. A government committed to religious pluralism must be able to recognize and accommodate religious needs. Many times, it may be impossible to know if in fact the Free Exercise Clause demands a particular accommodation. Or perhaps it is impossible to know just how much a nonmandatory accommodation may actually expand free exercise rights. But the First Amendment mandates that

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[135] In *Brown v. Gilmore*, the court outlined mandatory accommodation: "Not only is the government permitted to accommodate religion without violating the Establishment Clause, at times it is *required* to do so." 258 F.3d 265, 274 (4th Cir. 2001). In *Brown*, the Fourth Circuit held that Virginia's moment of silence statute, requiring that each school establish the daily observance of one minute of silence in each classroom, was constitutional as a minor and nonintrusive accommodation of religion. Ibid., 271, 278.

[136] Witte, *Religion and the American Constitutional Experiment*, 188.

religion be given every benefit of the doubt; it suggests that the costs of not accommodating religion may be too high to even risk.

V. THE CONSTITUTIONAL HISTORY IN SUPPORT OF GOVERNMENTAL ACCOMMODATION OF RELIGION

The constitutional history of the First Amendment shows that the kind of accommodation and recognition posed by the Public Expression of Religion Act clearly falls within constitutional bounds.

In eighteenth century America, religion was as publicly practiced as politics, with civil laws often reflecting religious values.[137] Public accommodations of religion were frequent, and few people believed that they constituted any kind of establishment of religion.[138] Indeed, the religious inspiration of the earliest colonies can be seen in their charters. The First Charter of Virginia, for instance, described the colony as serving "the Glory of his Divine Majesty."[139]

The Supreme Court has said that the religion clauses of the First Amendment are heavily

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[137] Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment,* (New York: Oxford University Press, 1986), 22, 51 (1986).

[138] Michael McConnell, "Accommodation of Religion: An Update and a Response to the Critics," 60 *George Washington Law Review* 685, 714 (1992). Generally, whenever conflicts occurred between civil law and religious belief, the latter was accommodated; and these accommodations were never seen as amounting to impermissible establishments, (ibid., 715).

[139] Michael McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *William and Mary Law Review* 2105, 2186.

grounded in the history surrounding their adoption.[140] It is a full and rich history, since religion provided the first political blueprints for many of the new colonies. And yet, throughout much of the modern Establishment Clause jurisprudence, the courts have largely ignored this history. Instead, they have focused almost single-mindedly on only one historical figure -- Thomas Jefferson -- and only one concept -- the 'wall of separation.'[141]

The framers never stated in a clear and unanimous voice their precise intention behind the general, broad language of the First Amendment. Perhaps that was because they considered the language clear and their intentions obvious. At any rate, the constitutional debates surrounding the drafting of the First Amendment are relatively sparse and somewhat meandering. But even though the literature may be ambiguous on the framers' views of religion and democracy, the historical record certainly is not. Abundant data exists on how eighteenth century Americans actually structured and maintained the relationship between democratic government and religion. Presumably, since it has never been seen as a constitutional provision of radical change, the First Amendment was intended to preserve this relationship that had evolved over nearly a century and a half. Thus, through a historical survey of the time, it is possible to illustrate consistent patterns and trends that existed throughout all the colonies and states of eighteenth century America.

Eighteenth Century Views on the Democratic Need for Religion

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[140] *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962); *McGowan v. Maryland*, 366 U.S. 420, 437-40 (1961).

[141] Michael W. McConnell, *"Establishment and Disestablishment,"* 2108 (2003).

More than any other single concept, the 'wall of separation' metaphor has shaped the direction of Establishment Clause doctrines in the modern era. However, not only does the metaphor have almost no historical basis, it actually contradicts the relationship between religion and government that existed in eighteenth century America.

To Americans of the constitutional period, religion was an indispensable ingredient to self-government.[142] Political writers and theorists emphasized the need for a virtuous citizenry to sustain the democratic process.[143] John Adams believed there was "no government armed with power capable of contending with human passions unbridled by morality and religion."[144] He wrote that "religion and virtue are the only foundations not only of republicanism and of all free government but of social felicity under all governments and in all the combinations of human society."[145]

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[142] Tocqueville likewise observed that the early Americans considered religion "necessary to the maintenance of republican institutions." Alexis de Tocqueville, *Democracy in America,* J.P. Mayer ed., (Garden City, N.Y.: Anchor Books, 1969), 293. He came to agree with this position, arguing that religion was desperately needed in a democratic republic (ibid., 294). Jefferson, in his *Notes on Virginia*, expressed the sentiment that belief in divine justice was essential to the liberties of the nation: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" Thomas Jefferson, *The Life and Selected Writings of Thomas Jefferson,* Adrienne Koch & William Peden, ed., (New York: Random House, 1944), 278-279.

[143] For a discussion on the influence of republican thought on the writing of the Constitution, Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke*, (Chicago: University of Chicago Press, 1988).

[144] *The Works of John Adams*, C.F. Adams, ed. (Boston: Little, Brown and Company,1850-1856) 9:229.

[145] *The Spur of Fame: Dialogues of John Adams and Benjamin Rush*, John A. Schutz and Douglass Adair, eds. (San Marino, Ca.: Huntington Library, 1966), 192. According to Benjamin Rush: "The only foundation for a useful education in a republic is to be laid in religion. Without it there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican

The constitutional framers "saw clearly that religion would be a great aid in maintaining civil government on a high plane," and hence would be "a great moral asset to the nation."[146] A 1788 New Hampshire pamphleteer expressed the prevailing view: "Civil governments can't well be supported without the assistance of religion."[147] This was why George Washington urged his fellow Virginians to appropriate public funds for the teaching of religion.[148] His objective was not to establish a religion, but to maintain a democratic government.

According to Washington, religion was inseparable from good government, and "no true patriot" would attempt to weaken the political influence of religion and morality.[149] As a general in the revolutionary army, he required church attendance by his soldiers.[150] At his urging in 1777, Congress approved the purchase of twenty thousand Bibles for the troops.[151] And in his Farewell Address to the

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governments." Brian Anderson, "Secular Europe, Religious America," *The Public Interest* (April 1, 2004) 143.

[146] Anson Phelps Stokes, *Church and State in the United States*, (New York: Harper, 1950),515.

[147] *The Complete Anti-Federalist*, Herbert J. Storing, ed.(Chicago: University of Chicago Press, 1981) 4:242.

[148] Joseph Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society*, (Washington, DC: Brookings Institute Press,1999). According to the framers, only within a religious congregation would people develop the civic virtue necessary for self-government. Ibid.

[149] David Barton, "The Image and the Reality: Thomas Jefferson and the First Amendment," 17 *Notre Dame Journal of Law, Ethics and Public Policy* 399, 428 (2003). George Washington saw religion as an incubator for the kind of civic virtue on which democratic government had to rely. Viteritti, "Choosing Equality," 127.

[150] Viteritti, "Choosing Equality," 127.

[151] A. James Reichley, *Religion in American Public Life*, (Washington, DC: Brookings Institution, 1985), 99.

nation at the end of his presidency, he warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."[152]

Late eighteenth century Americans generally agreed that the only solid ground for the kind of morality needed to build a virtuous citizenry lay with religious observance.[153] In early America, churches were the primary institutions for the formation of democratic character and the transmission of community values.[154] As Professors Richard Vetterli and Gary C. Bryner have explained:

> There was a general consensus that Christian values provided the basis for civil society. Religious leaders had contributed to the political discourse of the Revolution, and the Bible was the most widely read and cited text. Religion, the Founders believed, fostered republicanism and was therefore central to the life of the new nation.[155]

The notion that the First Amendment was intended to foster a strict policy of state neutrality or

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[152] *A Compilation of the Messages and Papers of the Presidents*, James D. Richardson, ed. (New York: Bureau of National Literature, 1897), 212. The framers believed, as for instance did George Washington, that religion and morality were the "indispensable supports" for democratic government. President George Washington, "Washington's Farewell Address, (Sept. 17, 1796)" in 1 *Documents of American History* 169, Henry S. Commager ed., (New York : Appleton-Century-Crofts, 1973), 169, 173.

[153] J. William Frost, "Pennsylvania Institutes Religious Liberty," in *All Imaginable Liberty: The Religious Liberty Clauses of the First Amendment,* Francis Graham Lee, ed. (Lanham, Md: University Press of America, 1995), 45.

[154] Michael McConnell, "Why is Religious Liberty the 'First Freedom'?" 212 *Cardozo Law Review* 1243, 1253 (2000). John G. West, *The Politics of Revelation and Reason: Religion and Civic Life in the New Nation,* (Lawrence: University of Kansas, 1996), 11-78. Through the middle of the 19th century, it was common practice for religious schools to be supported by state-generated revenue. Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society,* (New York: Hill and Wang, 1983), 166-67.

[155] Richard Vetterli & Gary C. Bryner, "Religion, Public Virtue, and the Founding of the American Republic," in *Toward a More Perfect Union: Six Essays on the Constitution,* Neil L. York, ed., (Provo, Utah: Brigham Young University, 1988), 91-92.

indifference toward religion would have been met with, to use Justice Storey's words, "universal disapprobation, if not universal indignation."[156] It was the separation of a specific church from state, not the separation of all religion from the state, that was the aim of the framers. Since law was an expression of morality, and since morality derived from religion, it was seen as both impossible and undesirable to completely separate state from religion.[157] Consequently, the constitutional principles of church-state relations arose out of a framework wherein religion and American culture were "intertwined."[158]

By the 1780s, the justification for governmental support of religion had ceased having any real theological component. The need to glorify or worship God did not explain the late eighteenth century belief in the value of religion for the new republic. Instead, there was only "the civic justification that belief in religion would preserve the peace and good order of society by improving men's morals and restraining their vices."[159]

Government Recognition and Support of Religion

Government during the founders' generation constantly supported religion.[160] It donated land

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[156] Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment*, (Westchester, Ill.: Crossway Books, 1987), 22.

[157] Ibid.

[158] Curry, *First Freedoms*, 218.

[159] McConnell, "*Accommodation of Religion*," 2197.

[160] No one seriously disputed the close relation between government and religion. McConnell, "*Establishment and Disestablishment*," 2193.

for the building of churches and religious schools. It collected taxes to support ministers and missionaries. It outlawed blasphemy and sacrilege, as well as unnecessary labor on the Sabbath.[161] Indeed, as of 1789, six states still maintained some formal system of public-supported religion.[162]

Stating that the "good order and preservation of civil government" depended upon "religion and morality," the Massachusetts constitution of 1780 provided for the "support and maintenance" of teachers of "piety, religion and morality."[163] In Pennsylvania, civil law prohibited blasphemy.[164] The Maryland constitution of 1776 authorized the state legislature to support religion.[165] Similar provisions were included in the original constitutions of Connecticut and New Hampshire, whose constitution also stated that no person of one sect would have to pay for the support of any other sect.[166]

Although the framers rejected the idea of an established church, they did not perceive any real tension between government and religious organizations.[167] To the contrary, the Bill of Rights was

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[161] John Witte, *Religion and the American Constitutional Experiment: Essential Rights and Liberties,* (Boulder, Co.: Westview Press, 2000), 53.

[162] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction,* (New Haven: Yale University Press, 1998), 32-33.

[163] Edwin S. Gaustad, "Religion and Ratification," in *The First Freedom: Religion and the Bill of Rights,* James E. Wood, Jr., ed. (Waco, Texas: Baylor University Press, 1990), 53 .

[164] Statutes at Large of Pennsylvania (1779), 9:313; Pennsylvania Statutes, 1794, printed in James Dunlop, General Laws of Pennsylvania, (1847), 151-54.

[165] *The Federal and State Constitutions,* Francis Thorpe, ed. (Washington, DC: Government Printing Office, 1909), 3:1189, 1705.

[166] Curry, *First Freedoms,*186.

[167] Viteritti, *Choosing Equality,* 16. And those who advocated government support of religion saw it as "compatible with religious freedom;" they did not equate it with establishment. Curry, *First Freedoms,* 217.

ratified in an age of close and on-going interaction between government and religion.[168] Congress appointed and funded chaplains who offered daily prayers, presidents proclaimed days of prayer and fasting, and the government paid for missionaries to the Indians. In the Northwest Ordinance, Congress even set aside land to endow schools that would teach religion and morality.[169]

The Public Expression of Religious Views

Religious beliefs found frequent expression in the acts and proceedings of early American legislative bodies. Five references to God appear in the Declaration of Independence. In setting up a government for the Northwest Territory in 1787, the Continental Congress charged it with furthering "religion, morality and knowledge" in the Territory.[170] Early in its first session, the Continental Congress resolved to open its daily sessions with a prayer,[171] and in 1782 it supported "the pious and laudable undertaking" of printing an American edition of the Scriptures.[172] Indeed, the proceedings of the

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[168] Ellis Sandoz, *A Government of Laws: Political Theory, Religion, and the Founding,* (Baton Rouge: Louisiana State University Press, 1990), 16; Patricia U. Bonomi, Under the Cope of Heaven: Religion, Society and Politics in Colonial America, (New York: Oxford University Press,1986).

[169] The Northwest Ordinance is reprinted in a footnote to Act of Aug. 7, 1789, ch.8, 1 Stat. 50. Edwin Gaustad, "Religion and Ratification," in *The First Freedom, Religion and the Bill of Rights,* 41-59.

[170] Anson Stokes & Leo Pfeffer, *Church and State in the United States*, (New York: Harper & Row, 1964), 85.

[171] Witte, *Religion and the American Constitutional Experiment*, 58.

[172] Rodney K. Smith, *Public Prayer and the Constitution: A Case Study in Constitutional Interpretation*, (Wilmington, Del: Scholarly, 1987), 66.

Continental Congress are filled with references to God and religion.

When the First Congress reenacted the Northwest Ordinance in 1789, the very same Congress that created the Bill of Rights, it declared that religion and morality were "necessary for good government."[173] This language was taken from the Massachusetts Constitution of 1780 and later copied into the New Hampshire Constitution of 1784,[174] and it indicates that the First Congress did not believe the First Amendment to prohibit public encouragement of religious exercise.[175] Congress also consistently permitted invocations and other religious practices to be performed in public facilities.[176] Even Thomas Jefferson, who was probably the most separationist of any of the founding generation, supported a proposal inviting religious sects to conduct worship services at the University of Virginia, a state institution.[177]

On September 26, 1789, the day after the final language of the First Amendment was adopted by Congress, and in a spirit of jubilation over passage of the Bill of Rights, the House and Senate both adopted a resolution asking the President to "recommend to the people of the United States, a day of

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[173] Thomas Nathan Peters, "Religion, Establishment and the Northwest Ordinance: A Closer Look at an Accommodationist Argument," 89 *Kentucky Law Journal* 743, 772 (2000-2001) (The Northwest Ordinance was originally enacted by the Continental Congress in 1787, and then re-enacted and adopted in 1789 by the First Congress).

[174] David Tyack, et al., *Law and the Shaping of Public Education, 1785-1954,* (Madison: University of Wisconsin, 1987), 26-27.

[175] Peters, *"Religion, Establishment and the Northwest Ordinance," 772.*

[176] Ibid., 103.

[177] Saul Padover, *The Complete Jefferson,* (Freeport, N. Y.: Books for Libraries 1969), 1110

public fasting and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of the Almighty God."[178] Thus, the First Congress obviously did not intend to render all public prayer unconstitutional under the Establishment Clause.[179]

In the years following ratification of the First Amendment, Presidents George Washington and John Adams continued to issue broad proclamations for days of national prayer.[180] James Madison likewise recognized that the government could designate days of solemn observance or prayer.[181] When he served in the Virginia legislature, he sponsored a bill which gave Virginia the power to appoint "days of public fasting and humiliation, or thanksgiving."[182] Later, during his presidential administration,

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[178] 1 Annals of Cong., 451.

[179] Beginning with the first session of the Continental Congress in 1774, the legislature opened its sessions with prayer; and the First Congress in 1789 established the office of Congressional Chaplain. Kurt T. Lash, "Power and the Subject of Religion," 59 *Ohio State Law Journal* 1069 (1998). Moreover, during the Constitutional Convention itself, Benjamin Franklin had asked that the Convention resort to prayer to overcome an impasse on certain divisive issues. Charles E. Rice, *The Supreme Court and Public Prayer,* (New York: Fordham University Press 1964) 36-37.

[180] Stokes & Pfeffer, *Church and State,* 87-88. Public religious proclamations were common in the post-constitutional period, from George Washington's first inaugural address in which he referred to the role of divine providence in guiding the formation of the United States, *see* Washington's First Inaugural Address, reprinted in United States, President, *A Compilation of the Messages and Papers of the Presidents,* 43, to opening sessions of Congress with a prayer. Smith, *Public Prayer,* 103.

[181] Dreisbach, *Real Threat and Mere Shadow,* 150. James Madison saw religious duties as being preeminent to civil duties. As he argues in his *Memorial and Remonstrance Against Religious Assessments*, an individual's duty to God "is precedent, both in order of time and in degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered a subject of the Governor of the Universe."

[182] Thomas Jefferson, *The Papers of Thomas Jefferson, II*, Julian Boyd, ed. (Princeton University Press, 1950), 556.

Madison issued at least four proclamations recommending days of national prayer and thanksgiving.[183] He also oversaw federal funding of congressional and military chaplains, as well as missionaries charged with "teaching the great duties of religion and morality to the Indians."[184]

The Eighteenth Century Understanding of Establishment

Because the Framers did not want to duplicate the English experience with the established Anglican church, a state preference of one denomination over others was what was primarily thought to be an establishment of religion throughout the colonial and constitutional periods.[185]

Separation of church and state was a concept focused on ensuring the institutional integrity of religious groups, preventing government from dictating articles of faith or interfering in the internal operations of religious bodies.[186] As Elisha Williams wrote, every church should have the "right to

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[183] Dreisbach, *Real Threat and Mere Shadow*, 151.

[184] James M. O'Neill, "Nonpreferential Aid to Religion is Not an Establishment of Religion," 2 *Buffalo Law Review* 242, 255 (1952).

[185] *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)(stating that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity").

[186] As Noah Feldman argues, the Establishment Clause was meant to protect religious liberty. Noah Feldman, "The Intellectual Origins of the Establishment Clause," 77 *New York University Law Review* 346 (2002), p. 403-05, 428. Similarly, Philip Hamburger interprets the Establishment Clause in terms of protecting religious liberty. He argues that the notion of 'separation of church and state' arose from the desire to keep religion uncorrupted by worldly influences. Philip Hamburger, *Separation of Church and State* (2002), 29, 38-39. Hamburger concludes from his historical study that the framers generation did not expect church and state to be kept apart from each other, but that the state would protect the church and would be the beneficiary of its moral influence. Ibid., 22, 24, 27.

judge in what manner God is to be worshiped by them, and what form of discipline ought to be observed by them, and the right also of electing their own officers" free of interference from government officials.[187] In the American view, the most repressive aspect of establishment involved government intrusion into religious doctrines and liturgies.[188] Under the Anglican system in England, for instance, the law mandated the type of liturgies and prayers to be used during worship services, as well as the fundamental articles of faith.

Although modern jurisprudence sometimes focuses on 'advancement of religion' as a key element of establishment, in eighteenth century America the key element taken from the Anglican experience was 'control.'[189] In England, it was the state that controlled the church, not the church that controlled the state; government officials dictated the appointment of ministers, and civil law controlled religious doctrine and articles of faith.[190] Thus, to the framers, an "establishment of religion" was understood to refer to "a church which the government funded and controlled and in which it used its coercive power to encourage participation."[191]

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[187] Elisha Williams, *The Essential Rights and Liberties of Protestants*, (Boston: Printed and sold by S. Kneeland and T. Green, 1744), 46.

[188] Witte, *Religion and the American Constitutional Experiment*, 51.

[189] McConnell, *Establishment and Disestablishment*, 2131.

[190] Religious doctrines and liturgies were governed by Parliament, which also enacted legislation restricting public worship by Catholics, Puritans and Quakers. Indeed, an array of penal laws punished Catholics, Puritans and Quakers who attempted the open exercise of religious faith outside the official church. Ursula Henriques, *Religious Toleration in England, 1787-1833*, (Toronto: University of Toronto Press, 1961), 6.

[191] Frederick Mark Gedicks, "A Two-Track Theory of the Establishment Clause," 43 *Boston College Law Review* 1071, 1091 (2002).

The ways in which the English establishment exerted control were twofold: to prohibit public religious worship outside of the Anglican Church; and to maintain government control over the ecclesiastical doctrines of the Church of England, rather than leaving such matters to the church clergy.[192] From the time of Elizabeth I, people not attending Anglican services were subject to monetary fines, the amount of which depended on the length of absence.[193] Marriages could be lawfully performed only by ministers of the Church of England, and the law refused to recognize the offspring of marriages performed outside the Church.[194] Thus, based on the English experience, Americans hinged their opposition to establishment not on any disagreement with government support of religion, but on an opposition to state tyranny over religious exercise.[195]

The Tradition of Nonpreferential Aid to Religion

During the constitutional period, there was a split of opinion on whether states could support and promote an individual Christian denomination. However, there was overwhelming agreement that government could provide special assistance to religion in general, as long as such assistance was given

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[192] McConnell, *Establishment and Disestablishment*, 2133.

[193] William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Philadelphia: R. Welsh and Company, 1961), 51-52.

[194] Sanford H. Cobb, *The Rise of Religious Liberty in America: A History*, (New York: MacMillan, 1902), 49-51.

[195] Curry, *First Freedoms*, 211.

without any preference among sects.[196] Both before and after the Revolution, Americans made a conscious distinction between two types of state action: the granting of exclusive privileges to one church, and a non-exclusive assistance to all churches. Only the former was considered to be an "establishment" of religion.[197] Catholics in Maryland, for instance, opposed any state-established religion, yet supported state aid to religion if conferred without preference between sects.[198] According to Thomas Cooley, the Establishment Clause prohibited only "discrimination in favor of or against any one Religious denomination or sect."[199]

The framers recognized that granting exclusive privileges and monopoly status to one religious

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[196] Patrick W. Carey, "American Catholics and the First Amendment," in *All Imaginable Liberty* Francis Graham Lee, ed.(Lanham, Md.:University Press of America, 1995),115. Even in Virginia, with the established Anglican Church, the growing sentiment in the late eighteenth century was that, while government could indeed give aid to religion, there should be equal treatment in such aid. Rodney Smith, *Public Prayer and the Constitution*, (Wilmington, Del.:Scholarly Resources, 1987), 45. As the French philosopher Jacques Maritain observed in *Reflections on America*, the term 'separation of church and state' in eighteenth century America meant "a refusal to grant any privilege to one religious denomination in preference to others." (cited in Michael Novak, "The Faith of the Founding," *First Things*, April, 2003, 27.)

[197] Curry, *First Freedoms*, 209. "The dominant image of establishment Americans carried with them from the colonial period on was that of an exclusive government preference for one religion (ibid., 210).

[198] Mary Virginia Geiger, *Daniel Carroll: A Framer of the Constitution*, (Washington, DC: Catholic University of America, 1943) 83-84.

[199] Thomas M. Cooley, *A Treatise on the Constitutional Limitations*, (Boston: Little, Brown 583 (1883). The Reverend Jaspar Adams, cousin of John Quincy Adams, wrote in 1833 that the term "establishment of religion" meant "the preference and establishment given by law to one sect of Christians over every other." Dreisbach, *Real Threat and Mere Shadow*, 70.

sect would only weaken religion, not strengthen it.[200] Madison, for one, declared that established religion tends toward "indolence in the clergy and servility in the laity."[201] The widespread eighteenth century view was that establishment exerted corrupting effects on the ministries of the established church.[202] Religious establishments were seen to "pervert rather than advance true religion."[203] Just as free markets were seen as producing a strong economy, disestablishment and free exercise were believed necessary to produce strong religions. Thus, it was for the purpose of strengthening religion that the Establishment Clause was drafted.[204]

During the Constitutional debates, Governor Samuel Johnston explained his support for the First Amendment and attempted to allay the fears of opponents by arguing that "there is no cause of fear that any one religion shall be exclusively established."[205] His wording was clear in its reference to the "exclusive" establishment of "one religion." To the Virginia ratifying convention of 1788, James

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[200] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Bk. V., ch.I, pt. II, art. III, (Oxford: Clarendon Press, 1976 [1776]), 309-310.

[201] James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in 5 *The Founders Constitution* 82, Philip B. Kurland & Ralph Lerner, eds.(Indianapolis: Liberty Fund, 1978).

[202] Elisha Williams, *The Essential Rights and Liberties of Protestants: A Seasonable Plea for the Liberty of Conscience and the Right of Private Judgment in Matters of Religion Without Any Controul from Human Authority*, (1744), 24.

[203] Carl Esbeck, "Dissent and Disestablishment," 2004 *Brigham Young University Law Review* 1385, 1506 (2004). As some eighteenth century writers argued, an "established religion is ultimately a religion controlled by irreligious persons." Ibid., 1521.

[204] McConnell, *"Why is Religious Liberty the 'First Freedom'?"* 1257.

[205] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippencott, 1941) 4:198-99.

Madison stated that religious liberty existed in America because of "that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society."[206] Richard Henry Lee, who thought any religion should be supported so as to foster public morality, did not consider disestablishment to mean the removal of government's "general ability to promote all religion."[207]

The framers' generation firmly embraced the nonpreferentialist tradition.[208] "It is revealing," historian Charles Antieau has noted, "that in every state constitution in force between 1776 and 1789 where 'establishment' was mentioned, it was equated or used in conjunction with 'preference.'"[209] North Carolina's constitution of 1776 stated that there "shall be no establishment of any religous church or denomination . . . in preference to any other."[210] Both the Delaware and New Jersey constitutions provided that "there shall be no establishment of any one religious sect . . . in preference to another."[211] (Later, over the course of the nineteenth and twentieth centuries, thirty-two different state constitutions

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[206] Ibid., 3:330; Levy, *Establishment Clause*, 125.

[207] James Madison, *Papers* Hutchinson et al., eds. (Chicago: University of Chicago Press, 1962), 8:149.

[208] James McClellan, *Joseph Story and the American Constitution*, (Norman: University of Oklahoma Press, 1971), 134.

[209] Chester J. Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee, Wis.: Bruce Pub. Co., 1964), p. 132.

[210] Curry, *First Freedoms*, 151.

[211] Ibid., 159.

would contain a "no preference" clause.[212] The Arkansas constitution of 1874 provided a typical example: "No preference shall be given, by law, to any religious establishment."[213])

According to the nonpreferentialist tradition, the religion clauses were designed to foster a spirit of accommodation between religion and the state, as long as no single church was officially established and governmental encouragement of religion did not deny any citizen the freedom of religious expression.[214] The very text of the First Amendment supports this view. The use of the indefinite article 'an,' rather than definite article 'the,' before the phrase 'establishment of religion' indicates that the drafters were concerned with government favoritism toward one sect, rather than a general favoritism of religion over nonreligion.[215] This notion is further supported in the congressional debates over the Establishment Clause. On August 15, 1789, Madison stated that he "apprehended the meaning of the words to be that Congress should not establish *a* religion, and enforce the legal observation of it by law."[216] This view was repeated in 1803 by Chief Justice Jeremiah Smith of New Hampshire who, subscribing to the view that an establishment constituted an exclusive government church, declared that New Hampshire had no establishment, even though the state had a tax system

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[212] Witte, *Religion and the American Constitutional Experiment*, 91.

[213] Constitution of Arkansas (1874), Art. II.24, 25.

[214] Dreisbach, "*Real Threat and Mere Shadow*," 54.

[215] Michael S. Ariens & Robert A. Destro, *Religious Liberty In a Pluralistic Society*, (Durham, No.Car.:Carolina Academic Press, 1996), 89. The clause was not a prohibition on favoritism toward religion in general. Dreisbach, *Real Threat and Mere Shadow*, 70.

[216] 1 Annals of Cong., H.R., 1st Cong., 1st Sess., 758 (Joseph Gales ed., 1790) (emphasis added).

which provided financial support to all denominations.[217] Neither Connecticut, Massachusetts nor Vermont considered their financial support of all churches to be an establishment of religion.[218] That was because, in the early American view, nothing in the language of the First Amendment foreclosed governmental promotion of religion in general, provided that it did so in a nonpreferential manner.[219]

James Madison repeatedly stressed that government could accommodate or facilitate religious exercise, so long as it did so in a nonpreferential way.[220] When he spoke of the proposed Establishment Clause as pertaining only to the establishment of a particular "national religion," he implicitly endorsed governmental "nondiscriminatory assistance" to religion in general.[221] At the Virginia Ratifying Convention, where delegates debated and voted on the proposed First Amendment, Madison spoke of the Establishment Clause in terms of an exclusive government preference for one religion. Edmund Randolph likewise spoke of "the establishment of any one sect, in prejudice to the rest." And Patrick Henry, arguing on behalf of the Establishment Clause, insisted that "no particular sect or society

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[217] William Gerald McLoughlin, *New England Dissent, 1630-1833,* (Cambridge, Ma.:Harvard University Press, 1971), 2:864.

[218] Curry, *First Freedoms,* 191.

[219] Theodore Sky, "The Establishment Clause, The Congress, and The Schools: An Historical Perspective," 52 *Virginia Law Review* 1395, 1427 (1966).

[220] Smith, *Public Prayer and the Constitution,* 56. What Madison opposed was government promotion of religion in a manner that would compel individuals to worship contrary to their conscience (ibid., 82). He feared that one sect might obtain a preeminence and establish a religion to which it would compel others to conform. Laurie Messerly, "Reviving Religious Liberty in America," 8 *Nexus* 151, 154 (2003).

[221] Walter Berns, *The First Amendment and the Future of American Democracy* (New York, 1976), 9.

ought to be favored or established, by law, in preference to the others."[222] As Thomas Curry notes in his history of the First Amendment, "by emphasizing the exclusive favoring of one particular sect, Americans appeared to draw a careful distinction between such an exclusive establishment and a favoring of all sects."[223]

The eighteenth-century adherence to nonpreferentialism hinged on the belief that the Exercise Clause is preeminent to the Establishment Clause.[224] Throughout the debates on the First Amendment, the prevailing view was that "the Establishment Clause should not be considered more important than the exercise of one's equal rights of conscience," and that the Establishment Clause "was to be treated merely as a means of facilitating the free exercise of one's religious convictions."[225] The preeminence of the Exercise Clause was also reflected in the belief that government should not be hindered in accommodating people's efforts to practice their religious beliefs.[226] Daniel Webster, for one, believed

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[222] *Debates*, Elliot, ed., 3:330, 204, 659.

[223] Curry, *First Freedoms*, 198. Even Rhode Island, which never gave any financial support to religion, proposed during its ratifying convention that the First Amendment provide that "no particular sect or society ought to be favored or established by law." Theodore Foster, *Theodore Foster's Minutes of the Convention Held at South Kingston, Rhode Island, in March, 1790,* Robert C. Cotner, ed, (Freeport, NY: Ayer Company Pub., 1929), 93.

[224] James Madison agreed with Justice Story's articulation of the intent of the framers: that the right of free exercise was the pre-eminent right protected by the First Amendment. Smith, *Public Prayer and the Constitution*, 84.

[225] Ibid., 79.

[226] Smith, *Public Prayer and the Constitution*, 84.

that government could actually promote religious exercise in the public square.[227]

Coincidental with their belief in the doctrine of nonpreferentialism, early Americans were almost universally opposed to the kind of strict separation of church and state that twentieth-century separationists would later espouse. Because of the fear that such separation would hinder the free exercise of religion,[228] the strict separationist view was almost nonexistent during the constitutional period.[229] This view, in fact, was wholly rejected by "every justice on the Marshall and Taney courts."[230]

Prior to the 1947 decision in *Everson v. Board of Education*,[231] the 'wall of separation'

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[227] Daniel Webster, *Works of Daniel Webster*, (Boston: C. C. Little and J. Brown, 1851), 6:176.

[228] Ibid., 108. *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States*, 2d ed., (1851), 593- 97. According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established, at the national level (ibid.).

[229] Strict separationists have ignored the historical data in their effort to build their case. They have selectively used snippets of history to justify an otherwise historically unsupportable position. Smith, *Public Prayer and the Constitution*, 55-6.

[230] McClellan, *Joseph Story and the American Constitution*, 136. On the other hand, the more separationist view espoused by Jefferson "was clearly not shared by a large majority of his contemporaries (ibid.). Until the mid twentieth century, American courts consistently endorsed the importance of religion in the nation's public life. Douglas W. Kmiec & Stephen B. Presser, *The American Constitutional Order: History, Cases, and Philosophy*, (Cincinnati: Anderson Publ. Co., 1998) 185-86.

[231] Thomas Jefferson, "Reply to a Committee of the Danbury Baptist Association" (Jan. 1, 1802), in *The Writings of Thomas Jefferson*, Vol. 16, Andrew A. Lipscomb & Albert Ellery Bergh eds., (Washington, DC: Thomas Jefferson Memorial Association 1905), 281-282.

metaphor had never appeared in Establishment Clause jurisprudence.[232] Its appearance in *Everson*, however, resulted more from cultural attitudes and beliefs than from constitutional precedent.[233] As Justice Rehnquist would later argue, "the greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights."[234]

The Framers' View of Religion

At around the time of the drafting of the First Amendment, individual states were ratifying their own constitutions and passing their own laws governing religion. In 1785, a bill for the "support of the public duties of religion" passed the Georgia legislature by a vote of forty-three to five.[235] The Delaware legislature declared in 1787 that it was their "duty to countenance and encourage virtue and

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[232] The 'wall of separation' phrase, however, did make its first appearance in a Supreme Court opinion on Free Exercise in *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878). But since Jefferson was not even present at the convention preparing the Constitution nor at the congressional debates over the Bill of Rights, he is not an appropriate authority for stating the intended meaning of the Establishment Clause. *Reynolds*, 98 U.S. 145, 163 (Jefferson was absent as minister to France.)

[233] Hamburger, *Separation of Church and State,* 454-55, 458. As Professor Hamburger points out, the majority of eighteenth century Americans did not wish to disconnect religion from government, only to disestablish denominations that were financially supported by the government. Ibid., 11-12. But when separation was adopted as a constitutional principle in the mid-twentieth century, it was done so by justices who had become so oriented by the prevailing culture to mistakenly think of religious freedom in terms of separation of church and state. Ibid., 458.

[234] *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

[235] Reba Carolyn Strickland, *Religion and the State in Georgia in the Eighteenth Century*, (New York: Columbia University Press, 1939), 166.

religion by every means in their power."[236] In 1789, the New Jersey legislature appointed a committee to "report their opinion on what may be proper and competent for the Legislature to do in order to promote the Interest of Religion and Morality among all ranks of People in this State."[237] And throughout the constitutional period, a system of compulsory financial support for religion continued to prevail in Massachusetts, Connecticut, New Hampshire and Vermont.[238]

The religion clauses of the First Amendment provide for a legal separation between church and state, not a moral separation.[239] To the framers, a government isolated from religious influence was just as unintended as a civil government devoid of moral influences.[240] The notion that the constitutional framers were afraid of religious influences over the state "is nonsense."[241] The whole justification of the Revolution had been interwoven with claims that freedom was a God-given right.[242]

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[236] State of Delaware, *The First Laws of the State of Delaware,* 2, pt. 1, John D. Cushing ed., (Wilmington, Del.: Michael Glazier 1981, [1797]), 878-79.

[237] *Journal of the Proceedings of the Legislative Council of New Jersey,* Sept., 13, 1789, Oct. 30, 1789.

[238] McConnell, *"Establishment and Disestablishment*," 2158.

[239] Jacob Marcellus Kirk, *Church and State,* (New York: Thomas Nelson & Sons, 1963), 116. Moreover, the words 'church' and 'state' refer to institutions; whereas 'religion' refers more generally to the beliefs and practices of society.

[240] As Professor Esbeck argues, a "separation of religion-based values from government and public affairs would have been received with wide disapprobation in the new nation." Esbeck, "Dissent and Disestablishment," p. 1580.

[241] Stephen Carter, "Reflections on the Separation of Church and State," 44 *Arizona Law Review* 293, 297 (2002).

[242] Bernard Bailyn, *The Ideological Origins of the American Revolution,* (Cambridge Mass.: The Belknap Press of Harvard University Press, enlarged ed., 1992), 315. *Political Sermons of the American Founding Era, 1730-1805*, Ellis Sandoz ed., (Liberty Fund, Inc., 1991), 139, 165, 713,

According to the most eminent nineteenth century constitutional scholars, the framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality towards religion.[243] A primary objective of the First Amendment was not to insulate society from religion, but to advance the interests of religion.[244] The framers wanted to create an environment in which the strong moral voice of religious congregations could influence the federal government and where the clergy could speak out boldly, without fear of retribution, on matters of public morality and the nation's spiritual condition.[245]

To the extent early Americans believed in separation of church and state, they believed in

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[243] Story, *Commentaries on the Constitution*, II, 3rd ed., (1858), 663 (stating that "at the time of the adoption of the Constitution, and of the [first] amendment to it..., the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship"). Cooley, *The General Principles of Constitutional Law*, 205-06 (stating that it "was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects"). Moreover, the political debates of the framers made frequent use of biblical references. One scholar surveyed 3,154 citations made by the Founders and discovered that more than one-third of them were to the Bible. Anderson, "Secular Europe, Religious America," 143.

[244] Mark DeWolfe Howe, *The Garden and the Wilderness*, (Chicago: University of Chicago Press, 1965), 31. The conventional wisdom of the time was that "the existence of healthy religious institutions was essential to the health of the state, and that the existence of healthy religious institutions depended on the support and protection of the state." Esbeck, "Dissent and Disestablishment," p. 1574.

[245] Dreisbach, *Real Threat and Mere Shadow*, 84. Robert Allen Rutland, *The Birth of the Bill of Rights*, (Chapel Hill: Published for the Institute of Early American History and Culture by the University of North Carolina Press, 1955) 127, 166-67, 184, 209.

dividing church from state, not God from state.[246] Moreover, the purpose of the separation was not to protect the state from religion, but to protect religious institutions from being regulated and corrupted by the state.[247]

Drafting and Debating the First Amendment

The framers' principal concern in drafting the Establishment Clause was to ensure equality among religions, not between religion and nonreligion.[248] They did not think that the government "should adopt a position of being areligious or certainly anti-religious."[249] To the contrary, they believed that government had a duty to affirmatively support religion.[250]

During the years immediately preceding enactment of the First Amendment, interest in some form of official support for religion was on the rise.[251] Many leaders were convinced that public virtue was declining, and this led to a loss of confidence in democracy.[252] The decline was attributed to the paucity of public religious worship and teaching, a result of the collapse of the established Anglican

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[246] Carter, "*Reflections on the Separation,*" 296.

[247] Ibid., 294.

[248] Witte, *Religion and the American Constitutional Experiment*, 47.

[249] Antieau et al., *Freedom from Federal Establishment*, 187-88 (1964) (describing the Framers' understanding of the presence of religious ideals in governmental institutions).

[250] Curry, *The First Freedoms,* 190.

[251] McConnell, "*Establishment and Disestablishment*," 2194.

[252] Ibid.

church.[253] Consequently, nearly every state witnessed a movement to strengthen religious institutions and practices within its borders. So just as the creation of the American republic coincided with a dismantling of the pro-monarchical Church of England, it simultaneously inspired a concern for strengthening religion in general, which in turn would promote republican virtue.[254] As Tocqueville wrote:

> Religion is much more needed in the republic they advocate than in the monarchy they attack, and in democratic republics most of all. How could society escape destruction if, when political ties are relaxed, moreal ties are not tightened? And what can be done with a people master of itself if it is not subject to God?[255]

On April 15, 1789, before beginning debate on the religion clauses, the First Congress voted to appoint two chaplains of different denominations to serve in each house for the duration of the debates.[256] During the ensuing proceedings on the Establishment Clause, one framer voiced his fear "that it might be thought to have a tendency to abolish religion altogether."[257] Mr. Gerry thought the amendment would be better if it stated that "no religious doctrine shall be established by law." Madison said he understood the amendment to mean that Congress "should not establish a religion and enforce

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[253] Thomas E. Buckley, *Church and State in Revolutionary Virginia*, (Charlottesville, Va.: Press of Virginia, 1977), 73-74, 81-82.

[254] McConnell, "*Establishment and Disestablishment*," 2196.

[255] Alexis De Tocqueville, *Democracy in America*, J.P. Meyer & Max Lerner eds., (New York: Harper & Row,1966)[1835], 294.

[256] 1 Annals of Cong., cols. 18-19, 233.

[257] United States. *The Debates and Proceedings in the Congress of the United States, Compiled from Authentic Materials*, Joseph Gales and W.W. Seaton eds., 42 vols. (Washington, D.C., 1834-56), I:448-59.

the legal observation of it by law." Benjamin Huntington worried that the Establishment Clause "might be taken in such latitude as to be extremely harmful to the cause of religion." He specifically feared that the public support of ministers or the building of churches "might be construed into a religious establishment." Finally, he hoped that the amendment would be interpreted so as "not to patronize those who professed no religion at all." Madison, in explaining the term establishment, stated that the primary fear of the drafters was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."

Much of the debates focused on the prohibition of government favoritism of one sect over any others. But there is another aspect of those debates worth noting, an aspect that encompasses the whole eighteenth century dialogue over religious establishment. As one historian has noted, a remarkable feature of the religion debates was that the advocates of the existing state establishments "tended to offer secular justifications grounded in the social utility of religion, whereas the most prominent voices for disestablishment often focused more on the theological objections."[258] In other words, the state needed religion more than religion needed the state. This was why governmental support of religion during this period "had nothing to do with religious belief."[259]

None of the twenty drafts of the First Amendment religion clauses in 1788 and 1789 ever included the principle of separation of church and state.[260]

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[258] McConnell, "*Establishment and Disestablishment*," 2205.

[259] Curry, *The First Freedoms,* 183.

[260] Witte, *Religion and the American Constitutional Experiment*, 91.

The Post-Ratification Environment

Scholars have noted that "close ties between religion and government continued . . . even after the adoption of the Bill of Rights."[261] The first four presidents included prayers in their first official acts as president.[262] Indeed, these prayers and religious messages set a tradition that continued to endure for another two hundred years.[263] Lincoln's famous and pervasively religious Second Inaugural Address has been called a "theological classic," containing "fourteen references to God, many scriptural allusions, and four direct quotations from the Bible."[264] And during the D-Day invasion of World War II, President Roosevelt read to the nation a prayer for the success of the mission.[265]

In an 1811 case affirming a conviction for blasphemy, Chief Justice Kent of the New York

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[261] Charles J. Russo, "Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?," 1999 *Brigham Young University Education and Law Journal* 1, 2 (1999). For a review of the status of state established churches at the time of the Revolutionary War, Richard Hoskins, "The Original Separation of Church and State in America," 2 *Journal of Law and Religion* 221 (1984); Kent Greenwalt, "Religious Convictions and Lawmaking, 84 Michigan Law Review 352 (1985).

[262] *Engel v. Vitale*, 370 U.S. 421, 445 (1962). This is evidence that "some forms of public prayer were not believed to constitute an establishment of religion." Jonathan Van Patten, "In the End is the Beginning: An Inquiry into the Meaning of the Religion Clauses," 27 *Saint Louis University Law Journal* 1, 23 (1983).

[263] And late into the twentieth century, a congressional law still required the president "to set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer." 36 U.S.C. §169(h) (1976).

[264] Elton Trueblood, *Abraham Lincoln: Theologian of American Anguish* (1973), p. 135-36.

[265] Titled *Let Our Hearts Be Stout*: *A Prayer by the President of the United States*, it read in part: "Almighty God - Our sons, pride of our nation, this day have set upon a mighty endeavor, a struggle to preserve our Republic, our religion and our civilization, and to set free a suffering humanity."

Supreme Court stated that in America "the morality of the country is deeply ingrafted" upon religion.[266] A year earlier, Massachusetts Chief Justice Theophilus Parsons in a religious establishment case noted the connection between the public good and the state of public morality: "The object of a free civil government . . . cannot be produced but by the knowledge and practice of our moral duties."[267] To Justice Parsons, civil laws were not sufficient to achieve order and justice. He argued that society depends upon behavior that cannot be legally enforced – behavior like charity and hospitality, benevolence and neighborliness, familial responsibility and patriotism. The best way to inculcate such values, according to Parsons, was to support religion. Later, in 1844, the U.S. Supreme Court noted the close relation of church and state when it recognized that "religion is a part of the common law."[268]

Even the 1833 Massachusetts state constitutional amendment which abolished the mandated payment of tithes for religion left intact the provisions that commended religious ceremony and morality. The preamble of the constitution continued to assert that it was "a covenant" between God and the people of Massachusetts.[269] Similar endorsements of religious morality appeared in other state constitutions. Connecticut, Delaware and Maryland stated that it was the duty of citizens to worship God. Another six constitutions repeated the language of the Northwest Ordinance that "religion, morality and knowledge" were necessary for good government.[270]

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[266] *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811).

[267] *Barnes v. First Parish in Falmouth*, 6 Mass. 401, 404 (1810).

[268] *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 198 (1844).

[269] Witte, *Religion and the American Constitutional Experiment*, 94.

[270] Ibid, 96.

During the post-constitutional period, federal statute mandated the refunding of import duties paid on vestments, paintings and furnishings for churches, and on plates for printing the Bible.[271] In 1819, New Hampshire passed a law authorizing towns to support Protestant ministers, a law that remained on the books for the rest of the century.[272] However, education was the area involving perhaps the closest ties between church and state. The school system was largely overseen by the clergy, usually with the support of local taxes.[273] In New York in 1805, for instance, schools run by Presbyterian, Episcopalian, Methodist, Quaker, and Dutch Reformed groups all received public support.[274] Later, these groups were joined by Baptists, Catholics and Jews.[275]

Tocqueville observed in 1833 that in America "almost all education is entrusted to the clergy."[276] During the nineteenth century, it was common practice for religious schools in New Jersey, Connecticut, Massachusetts and Wisconsin to be supported by state-generated revenue.[277] In 1850,

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[271] John T. Norman, Jr., *The Lustre of Our Country,* (Berkeley; University of California Press, 1998) 218.

[272] Cobb, *The Rise of Religious Liberty in America,* 516.

[273] Bernard Bailyn, *Education and the Forming of American Society,* (New York: Vintage Books, 1960).

[274] Diane Ravitch, *The Great School Wars, New York City, 1805-1973: A History of the New York City Public Schools As a Battlefield of Social Change,* (New York: BasicBooks, 1974), 6-7.

[275] Ibid.

[276] Alexis de Tocqueville, *Democracy in America,* Philips Bradley, ed., (New York:A. A. Knopf, 1945), 320, n.4.

[277] Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860,* (New York: Hill and Wang, 1983), 166-67.

the California legislature gave religious organizations control over a large part of the state's education budget, as it was those organizations that were educating the burgeoning immigrant population.[278] Up until 1864, education in the District of Columbia was provided entirely through private and religious schools which received public support.[279] And many of the nation's first public schools and state universities had mandatory courses in religion and required attendance at daily chapel and Sunday worship services.

Aside from education, there was a strong religious character to whatever social welfare systems existed in the community.[280] Government depended on churches and religious organizations for providing most social services in the community.[281] Even by the end of the nineteenth century, the federal government was financing the construction of religiously affiliated hospitals.[282]

Remaining Vestiges of Religion's Public Role

Many signs of America's historical religious identity survive today. Witnesses in courts swear

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[278] Tyack,, et al., *Law and the Shaping of Public Education*, 90-91.

[279] Richard J. Gabel, *Public Funds for Church and Private Schools*, (Washington, D.C.: The Catholic University of America Press, 1937), 173-79.

[280] Philip R. Popple & Leslie Leighninger, *Social Work, Social Welfare, and American Society*, (Boston: Allyn and Bacon, 1990), 103-07. It was religious organizations that performed most social services, including education. William C. Bower, *Church and State in Education*, (Chicago, Ill.: University of Chicago Press, 1944), 23-24. (stating that "the earliest education in America was predominantly religious."

[281] Mark E. Chopko, "Religious Access to Public Programs and Governmental Funding," 60 *George Washington Law Review* 645, 647 (1992).

[282] *Bradfield v. Roberts*, 175 U.S. 291, 296-97 (1899).

on the Bible and take an oath that concludes "So help me God." Presidential proclamations invoke God. The Supreme Court opens its sessions with the invocation "God save the United States and this honorable Court," and overlooking the Court's chamber is a frieze depicting the Ten Commandments. In the House and Senate chambers appear the words "In God We Trust." The Great Seal of the United States proclaims "Annuit Coeptis," which means "God has smiled on our undertaking," and under the seal is inscribed the phrase from Lincoln's Gettysburg Address, "This nation under God." Adorning the walls of the Library of Congress are the words of Psalm 19:1 and Micah 6:8, and engraved on the metal cap of the Washington Monument are the words "Praise be to God." Both houses of Congress, as well as many state legislatures, precede their daily work with a prayer given by a public-funded legislative chaplain, and the national currency carries the motto "In God We Trust."

CONCLUSION

The Public Expression of Religion Act should be enacted so as to eliminate the chilling effect on First Amendment freedoms caused by the current damages and remedies available in Section 1983 lawsuits alleging Establishment Clause violations. The fear of incurring these damages and remedies, a fear intensified by the confusing and inconsistent judicial applications of the Establishment Clause, may well cause governmental units to discriminate against religious speech on public property, prohibiting it entirely. Moreover, even if the Public Expression of Religion Act is not found to be necessary to prevent First Amendment restrictions, it is nonetheless permissible as a constitutionally accepted accommodation of religion.

For all the reasons stated above, it is also suggested that, while H.R. 2679 applies to state and

local governments, a similar measure should be adopted that would apply to Establishment Clause actions brought against the federal government.